STATE OF MICHIGAN

SUPREME COURT

CHRISTOPHER D. BENTFIELD,

Plaintiff/Appellee,

-vs-

BRANDON'S LANDING BOAT BAR, DAVID WATTS, INC. ~~a Michigan Corporation~~, and David Watts

Defendants/Appellants.
_____/

Supreme Court No. _____

Court of Appeals No. 248795 Grn 8/31/04 Rec 11/19/04

Lower Court No. 2002-039613-NO ok
Judge Colleen A. O'Brien
Oakland

DAVID LAWRENCE RAVID (P33384)
JOSEPH M. PASCUZZI (P39320)
Attorneys for Plaintiff/Appellant
23855 Northwestern Highway
Southfield, MI 48075
(248) 948-9696

RICHARD F. CARRON (P52854)
Attorney for Defendants/Appellees
28819 Franklin Rd., Ste. 100
Southfield, MI 48034
(248) 204-4649
_____/

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NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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Attorneys for Plaintiff/Appellee
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Southfield, MI 48075
(248) 948-9696

RICHARD F. CARRON (P52854)
Attorney for Defendant/Appellant
28819 Franklin Rd., Ste. 100
Southfield, MI 48034
(248) 204-4649
_____/

APPEAL OF JUDGMENT

I. INTRODUCTION

Plaintiff was involved in a slip and fall on the sidewalk outside of Defendant's establishment on or about January 18, 2000. He was a tenant in an upstairs apartment in Defendant's establishment. He filed a complaint alleging premises liability in the Oakland County Circuit Court on April 1, 2002. Defendant filed a motion for summary disposition on December 17, 2002. Plaintiff filed a response brief on March 19, 2003 and Defendant filed a reply brief on March 25, 2003. The oral argument for Defendant's motion for summary disposition was heard by Judge O'Brien in the Circuit Court for the County of

Oakland on March 26, 2003.

Plaintiff did not argue or even mention a statutory duty in his response brief or during oral argument. Judge O'Brien issued an opinion and order granting Defendant's motion for summary disposition. Plaintiff filed a Motion for Reconsideration and Rehearing of Opinion and Order Granting Defendant's Motion for Summary Disposition on April 9, 2003.

It was at that time that Plaintiff first raised the issue of a statutory duty allegedly owed by Defendant. Judge O'Brien denied Plaintiff's motion. Plaintiff filed an appeal asking the court to reverse the trial court because the statutory duty owed by Defendants to Plaintiff precluded the use of the open and obvious defense. The Appellate Court granted Plaintiff's appeal. The Appellate Court denied a subsequent Motion for Reconsideration filed by Defendant.

Defendant/Appellant now files Application for Leave to Appeal to the Supreme Court in order for the Supreme Court to correct the injustice placed upon Defendant. Defendant also requests the Supreme Court to grant the Application so that the Supreme Court may provide a more recent Supreme Court opinion to guide the lower courts, practitioners, and litigants.

II. STATEMENT OF ORDER BEING APPEALED AND RELIEF SOUGHT

Defendant appeals from the unpublished per curiam opinion of the Court of Appeals, released August 31, 2004, reversing the order of the Oakland County Circuit Court, entered March 26, 2003, granting Defendant's Motion for Summary Disposition and dismissing Plaintiff's Complaint.

Defendant asks that this Court reverse the decision of the Court of Appeals and reinstate the judgment of the Oakland County Circuit Court.

III. STATEMENT OF QUESTIONS PRESENTED

WHETHER PLAINTIFF CAN ALLEGE A NEW CAUSE OF ACTION IN A MOTION FOR RECONSIDERATION, DESPITE THE FACT THAT THE NEW CAUSE OF ACTION WAS AVAILABLE BEFORE THE TRIAL COURT'S ORDER GRANTING SUMMARY DISPOSITION.

Defendant/Appellant answers "yes."

Plaintiff/Appellee answers "no."

Trial Court answered "yes."

Court of Appeals answered "no."

IV. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

1. Statement of Material Facts

Plaintiff filed this lawsuit alleging premises liability against Defendant after Plaintiff was injured when he slipped and fell on a patch of ice covered by snow, located to the side of his apartment entrance. Defendant Brandon's Landing Boat Bar ran a bar/restaurant on the ground level of the subject premises and leased a second-story apartment to Plaintiff. The front door to the bar leads to the upstairs apartment. On the date of loss, Plaintiff had gone shopping and upon his return, his hands were full as he was carrying two bags of groceries, an extra McDonald's sandwich, a large pop, and also had a cigar in his fingers. (Plaintiff's deposition transcript, page 42.) While walking toward the front door he could not see the ground because of the items in his hands and he slipped and fell on a patch of ice. (Plaintiff's deposition transcrept page 51 and 92.) Upon information and belief, there are no facts relevant to this application that are in dispute

2. Statement of Material Proceedings

On or about April 1, 2002, the Plaintiff, Christopher Bentfield, filed the instant action in the Oakland County Circuit Court. (Docket Sheet, page 1 - Exhibit A). Said complaint is devoid of any reference to any statutory duties imposed by MCL 455.4139. On or about December 17, 2002, the Defendants, Brandon's Landing Boat Bar, David Watts, Inc., a Michigan corporation, and David Watts, an individual, filed a Motion for Summary Disposition[1]. (Docket Sheet, page 4). Plaintiff filed his response to Defendant's Motion for Summary Disposition, together with his brief in opposition, on or about March 19, 2003.

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[1] On the day of the motion for summary disposition hearing, Plaintiff stipulated to the dismissal of Defendant, David Watts, an individual. (Motion for Summary Disposition transcript, page 3).

(Docket Sheet, page 5). Defendant filed a brief in reply on or about March 25, 2003. (Docket Sheet, page 5). The Motion for Summary Disposition was heard by Judge O'Brien in the Circuit Court for the County of Oakland on or about March 26, 2003 and Judge O'Brien issued an opinion and order granting Defendant's Motion for Summary Disposition. (Docket Sheet, page 5). (Opinion - Exhibit B).

Plaintiff filed a Motion for Reconsideration and Rehearing of Opinion and Order Granting Defendant's Motion for Summary Disposition on or about April 9, 2003. (Docket Sheet, page 5). Defendant filed a response brief to Plaintiff's Motion for Reconsideration on or about April 15, 2003. (Docket Sheet, page 6). Judge O'Brien issued an opinion and order, dated May 6, 2003, denying Plaintiff's Motion for Reconsideration. (Docket Sheet, page 6). Plaintiff filed a Claim of Appeal on or about May 23, 2003 (Docket Sheet, page 6) and filed his brief on appeal on or about September 17, 2003. Defendant filed Appellee's brief on appeal on or about November 19, 2003. The Michigan Court of Appeals heard oral argument from the parties on July 13, 2004.

On August 31, 2004, the Court of Appeals issued a per curiam opinion where it affirmed the trial court's ruling that the alleged condition was open and obvious, reversed the trial court's denial of Plaintiff's Motion for Reconsideration because the trial court was presented with the statutory duties of MCL 554.139, and remanded proceedings to the trial court to determine whether Defendants maintained the premises "in reasonable repair and in compliance with the state and local safety laws." (Per Curiam Opinion No. 248795 - Exhibit C). On September 21, 2004, Defendant filed Defendant/Appellant's Motion for Reconsideration pursuant to MCR 7.215(L) with the Court of Appeals. On October 19, 2004, the Court of Appeals ordered that the Motion for Reconsideration be denied. Please

note that Judge Kathleen Jansen and Jessica Cooper were in the majority and Judge Patrick Meter dissented by stating "Judge Meter would grant the motion for reconsideration."

3. Statement of Jurisdiction

This Court has jurisdiction to review a decision of the Court of Appeals pursuant to MCR 7.301(A)(2). Defendants/Appellants have timely filed this application for leave to appeal pursuant to MCR 7.302(A) and in accordance with the time frame for seeking application for leave to appeal set forth in MCR 7.302(C)(2). This appeal is timely and this Court has jurisdiction to grant this application for leave to appeal upon a determination by the Court that this application meets the requirements for granting leave as set forth in MCR 7.302(B).

V. ARGUMENT IN SUPPORT OF GRANTING LEAVE TO APPEAL

A. Standard of Review

This is an appeal from the Court of Appeals' decision reversing, in part, the grant of summary disposition in favor of Defendant by the trial court. Summary disposition decisions are reviewed by the appellate courts of this state de novo. Pinckney v Continental Casualty Co., 213 Mich App 521, 525; 540 NW2d 748 (1995). A trial court's ruling on a motion for reconsideration is reviewed for an "abuse of discretion." Churchman v Rickerson, 240 Mich App 223, 223; 611 NW2d 333 (2000).

B. Statement in Support of Granting Leave to Appeal

The Defendant/Appellant recognizes that the granting of leave to appeal is extraordinary, and under MCR 7.302(B), the Defendant/Appellant must demonstrate that

the issues presented in this case involve a substantial question as to the validity of a legislative act; that the issue has significant public interest; that the issue involves legal principles of major significance to the state's jurisprudence, or that the Court of Appeals' decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. The Appellate Court's decision in the case at bar involves legal principles of major significance to the state's jurisprudence, is clearly erroneous and will cause material injustice, and the decision conflicts with Supreme Court decisions and other decisions of the Court of Appeals.

1. **The Appellate Court's decision involves a legal principle of major significance to the state's jurisprudence.**

The Appellate Court's decision allows parties an impermissible "second bite at the apple." The majority of the Appellate Court panel for the case at bar has made it possible for a Plaintiff to pursue new theories after conducting lengthy discovery and unsuccessfully litigating their original claims. This is clearly contrary to the Michigan Rules of Court enacted by the Michigan Supreme Court. MCR 2.203(A) entitled Compulsory Joinder states:

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleadings, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

In the case at bar, the majority has essentially allowed Plaintiff to litigate his original claim which resulted in dismissal pursuant to summary disposition, only to be able to then

relitigate a completely new, but previously available statutory allegation without any discovery having been conducted regarding same. The separate statutory allegation was not even properly pled in the complaint. Had a statutory duty been pled, Plaintiff certainly would have conducted appropriate discovery, included the argument in his response brief, and/or argued it at the motion for summary disposition hearing. What simply occurred is that Plaintiff, through lack of due diligence, failed to plead or properly preserve the statutory duty issue. Merely mentioning that Plaintiff was a tenant could not possibly have placed Defendant on notice that Defendant may have breached a statutory duty. Nor did Plaintiff file a motion for leave to file an amended complaint.

If all plaintiffs are able to conduct lengthy and effective discovery regarding their original allegations resulting in dismissal pursuant to summary disposition, only to be able to file a motion for consideration with new allegations **that were previously available but not pursued**, defendants, and the courts will be severely prejudiced and will be subjected to unwarranted delays in time, costs, and stress. The same may become true for Defendants using a motion for reconsideration to advance new or additional defenses. The dockets of the Michigan courts will become even more overloaded.

The majority panel's decision would also allow plaintiffs the ability to "sandbag" defendants by allowing plaintiffs to pursue allegations in a piecemeal fashion, thus preventing defendants from conducting complete, competent, and efficient discovery and prejudicing defendants by the possible loss of evidence and/or witnesses due to the passage of time. Over time, memories tend to fade and witnesses can disappear.

By allowing plaintiffs the opportunity to simply file a motion for reconsideration that asks the court to consider a newly-raised issue that was previously available and could

have been raised before the court's order granting a defendant's motion for summary disposition, Michigan defendants will be further prejudiced because MCR 2.119(F)(2), entitled Motions for Rehearing or Consideration, states "No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs." Accordingly, pertaining to motions for reconsideration, this majority panel has essentially given plaintiffs "carte blanche" because defendants are not even allowed to contest plaintiffs' motion for reconsideration. As such, the Michigan defendants' **right to due process** will be adversely affected. As stated, the Appellate Court's decision in the case at bar involves a legal principle of major significance to the state's jurisprudence.

2. **The Michigan courts have ruled that a previously-available issue brought to the court's attention for the first time at a motion for rehearing is not preserved. The Appellate Court's decision in the case at bar conflicts with a Supreme Court decision and other decisions of the Court of Appeals.**

The Michigan Appellate Court in Charbeneau v Wayne County General Hosp., 158 Mich App 730 (1987) addressed a very similar issue. The Court at page 733 stated:

> We decline on procedural grounds, to decide the merits of plaintiff's allegations that the operation of Wayne County General Hospital is ultra vires.
>
> Plaintiff did not plead such ultra vires activity in his Complaint and did not argue that theory at the hearing on defendant's motion[1], and thus summary disposition was properly granted. Hyde, Supra, p 261. Plaintiff did raise the present argument when he moved for reconsideration, but we cannot say that denial of reconsideration was error.
>
> Generally, a motion for rehearing or reconsideration must demonstrate a "palpable error by which the Court and the parties have been misled." MCR 2.119(F)(3). The grant or denial of a motion for reconsideration rests within the discretion of the Trial Court. Id. *We find no abuse of*

discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the Trial Court's original order. (Emphasis added.)

The Charbeneau case makes reference to a Michigan Supreme Court decision, Brookdale Cemetary Assn. v Lewis, 342 Mich 14 (1955).

In the Charbeneau, supra, case Plaintiff raised due process and equal protection claims. The Charbeneau court indicated "First, plaintiff failed to present these issues to the trial court. Generally, constitutional challenges to a statute may not be raised for the first time on appeal." Brookdale Cemetary Assn. v Lewis, 342 Mich 14, 18, 69 NW2d 176 (1955).

In the case at bar, Plaintiff essentially failed to present the issue of a statutory duty to the trial court, and was therefore precluded from raising the issue in his appeal. Accordingly, the Brookdale, supra, case indicates that the Michigan Supreme Court would find that Plaintiff failed to preserve the statutory duty issue for his appeal.

The United States Court of Appeals, 6th Circuit, in American Meat Institute v Pridgeon, 724 F.2d 45 (1984) considered a case wherein Defendants raised an issue regarding severability **for the first time in their Motion for Reconsideration**. The Circuit Court ruled "By bringing this issue before the District Court in such an untimely fashion, Defendants effectively waived their argument on severability and have no basis to assign failure to sever as an error on this appeal."

The United States Court of Appeals, 6th Circuit, in Insurance Company of North America v Dynamic Construction Company, 106 F.3d 400, 1997 WL 14417 (6th Cir.) (Mich)) unpublished opinion, considered the case where the owner of Defendant company,

Andrew M. Kowal, appealed two Orders concerning attorney fees awarded to Plaintiff. Defendants filed a Motion for Reconsideration of a January, 1993 Order granting additional costs and attorney fees incurred by INA between July, 1989 and October, 1992. The Court stated:

> Mr. Kowal did not raise the issue of the reasonableness of the attorney fees until he moved for reconsideration. The issue was raised too late to be preserved for appeal. Even if the issue were properly before us we would uphold the award. An abuse of discretion standard would apply under both Federal and Michigan law[,] and we are satisfied, based on an independent review of the itemized fees, that no abuse of discretion occurred here. Mr. Kowal asks us to examine several other issues pertaining to the fee award, but we declined to do so. These issues were raised for the first time on appeal or, at the earliest, in the Motion for Reconsideration and have thus been waived. (Emphasis added.)

The Michigan Court of Appeals in Neal v Kelly, unpublished opinion, 1997 WL 33344215 (Mich App) (Exhibit D) considered an issue where appellant appealed the trial Court order approving a personal representative's proposed distribution awarding $388,881.58 of a $457,381.58 net settlement to appellee Neal and $2,500.00 to appellant Kelly. The trial Court denied Defendant's Motion for Reconsideration regarding the distribution. The Michigan Appellate Court stated:

> Although he could have done so, appellant did not raise any of these issues or object to any of these alleged errors prior to or during the distribution hearing. **The purpose of appellant preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminating its prejudice, or at least make a record of the error and its prejudice**. People v Taylor, 195 Mich App 57, 60; 49 NW2d 99 (1992). **A party cannot seek reversal on the basis of an error that the party caused by either plan or negligence**. Detroit v Larned Associates, 199 Mich App 36, 38; 501 NW2d 189 (1993). **Furthermore, counsel may not**

> **remain silent, electing to "take his chances" on a verdict and then later raise questions which could and should have been addressed in time for corrective judicial action**... Because appellant apparently chose to remain silent and "take his chances" on the outcome of the distribution hearing conducted under the circumstances that he now challenges on appeal, and because he did not raise the issues when the alleged errors could have been corrected, if necessary, we hold that the trial court did not err when it denied appellant's Motion for Reconsideration, CMCR 2.119 F3, and that the issues first raised in appellant's Motion for Reconsideration are not preserved for appeal. See Napier, Supra; Kinney, Supra; Larned Associates. (Emphasis added.)

The Michigan Appellate Court in its unpublished decision American International Group v Liberty Mutual Insurance Company, 1998 WL 1986992 (Mich App) (Exhibit E) denied Plaintiff's appeal of the trial Court's Order granting summary disposition to Defendants. In that 1998 case, Plaintiff filed a Motion for Reconsideration which raised for the first time an estoppel argument, and also claimed, for the first time, that §3145(2) was "mistakenly applied" and that its claim was not for first-party property loss but for recoupment. While stating that Plaintiff's claims **were not preserved for appellate review** the Court stated:

> It was only after the trial Court granted summary disposition to Defendants that Plaintiff claimed in its Motion for Rehearing/Reconsideration [FN4] that §3145(2) does not apply, notwithstanding its concession to the contrary in its response to the Motions for Summary Disposition [FN5] in this factual and procedural contest, Plaintiff cannot seek appellate redress. It is well settled that, as a general rule, an issue is not properly preserved if it not raised before and addressed by the trial Court. Phinney v Perlmutter, 222 Mich.App. 513; 564 NW2d 532 (1997). (Emphasis added.)

The Michigan Appellate Court in a published decision, Churchman v Rickerson, 240 Mich App 223; 611 NW2d 333 (2000), reiterated the law in the state of Michigan by stating:

However, we can find no abuse of discretion in the denial of a motion for reconsideration that rests on testimony that could have been presented the first time the issue was argued. Charbeneau v Wayne Co. General Hosp., 158 Mich App 730, 733, 405 NW2d 151 (1987). "Churchman at 233. The Churchman case contained an issue wherein plaintiff submitted an original affidavit by a doctor indicating that plaintiff had a closed head injury. The trial court granted defendant's motion for summary disposition because the original affidavit by the doctor was not sufficient to satisfy the threshold requirement of the no-fault statute.

The Churchman plaintiff filed a motion for reconsideration in which plaintiff included a second affidavit from the doctor describing in more detail plaintiff's closed head injury in order to attempt to satisfy the no-fault threshold. Again, the Appellate Court denied plaintiff's motion for reconsideration because plaintiff could have presented the testimony contained in the second affidavit the first time the issued was argued. Similarly, in the case at bar, Plaintiff could have argued the statutory duty at the time the motion for summary disposition was argued.

In a very recent and very similar case wherein two of the judges who sat on the panel are the two judges who overturned the trial court in the case at bar, the Michigan Court of Appeals in the unpublished decision, Hernandez v Taylor Commons Ltd. Partnership, decided on June 29, 2004, (Docket No. 247576), (Exhibit F), affirmed the trial court's grant of summary disposition. The trial court granted defendant's Motion for Summary Disposition based upon the open and obvious doctrine. Plaintiff-Appellant filed a Motion for Reconsideration that was denied by the trial court. The Appellate Court, again, affirmed the trial court's ruling regarding the open and obvious defense, and affirmed the trial court's order denying Plaintiff-Appellant's Motion for Reconsideration

because Plaintiff-Appellant failed to preserve the issue of whether or not the open and obvious doctrine applies to a statutory duty. Oddly enough, both **Justice Jansen** and **Justice Cooper**, along with Justice Murphy, were on the Hernandez panel.

In the case at bar, contrary to the decision made almost two months previously, **Justices Jansen** and **Cooper** reversed the trial court's order denying Plaintiff-Appellant's Motion for Reconsideration despite the fact that Plaintiff-Appellant failed to raise the argument that the open and obvious doctrine does not apply in cases where defendants have been alleged to have breached a statutory duty.

In the Hernandez, supra, case, the court noted that plaintiff argued, in Plaintiff's Motion for Reconsideration at the trial court, that the open and obvious danger doctrine could not be used to avoid a specific statutory duty. The Hernandez court also noted that the trial court denied the motion **in cursory fashion.** Hernandez presented the same argument on appeal. The Appelate Court in Hernandez stated that in the Woodbury v Bruckner, supra, case, the Supreme Court **reiterated** the principle, stating that "the open and obvious doctrine can not be used to avoid a specific statutory duty." Justices Murphy, Jansen and Cooper addressed **the very same issue as is in the case at bar** regarding Plaintiff-Appellant's failure to preserve his issue, by stating in Hernandez, supra: "Plaintiff's argument fails because the argument was not presented in response to the motion for summary disposition and there was no allegation in the complaint and amended complaint asserting a cause of action or claim for violation of city code." (Emphasis added.) The justices in Hernandez stated further:

> In Charbeneau v Wayne Co Gen Hosp, 158 Mich. App. 730; 405 NW2d 151 (1987), the plaintiff raised issues and

> arguments in a motion for reconsideration that were not pled in the complaint nor raised during summary disposition. The Charbeneau panel ruled: "We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have pled or argued prior to the trial court's original order. Id at 733. (Emphasis added.)
>
> Jones was issued by our Supreme Court in September, 2002, and plaintiff cites even earlier cases suggesting that the open and obvious doctrine cannot be used to avoid a specific statutory duty, e.g., Walker v Flint, 213 Mich. App 18; 539 NW2d 535 (1995). Defendants' motion for summary disposition was filed in October, 2002, yet plaintiff chose not to raise the argument in response to the motion. Furthermore, plaintiff did not plead a cause of action or make a claim predicated on a violation of a local code in his complaint and amended complaint, nor did plaintiff attempt to file a second amended complaint to add such a claim. [FN 6] We find no abuse of discretion with respect to the trial court's denial of a motion for reconsideration.

In footnote 6 of the Hernandez decision, the Court referred to MCR 2.116(I)(5) that provided "[i]f the grounds asserted are based on sub-rule (C)(8), (9) or (10), the Court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the Court shows that amendment would not be justified." The Hernandez Court continued their analysis by noting that Hernandez made no request to amend the complaint. In the case at bar, Plaintiff-Appellant never filed a motion asking the Court to amend his complaint.

This Appellate panel's decision clearly runs contrary to unpublished court decisions, Sixth Circuit opinions, **published** Michigan Court of Appeals decisions that constitute stare decisis, and the Michigan Supreme Court opinion referred to in Charbeneau, supra.

In footnote 3 of this panel's order in the case at bar, this Court stated:

> **Typically, it is not an abuse of discretion for the Trial Court to deny a motion for reconsideration where a legal theory**

> **or facts could have been argued before the entry of a trial court's original order. See Charbeneau v Wayne Co Gen Hosp, 158 Mich App 730, 733; 405 NW2d 151 (1987).** But we note that in light of the fact that the trial court did not base its denial on the fact that Plaintiff did not specifically make the claim prior to the trial court's original order, and the recentness of the case supporting Defendant's claim; an abuse of discretion exists. The case supporting Plaintiff's position was decided December 26, 2002. Plaintiff's complaint was filed April 1, 2002, and brief in opposition to Defendant's Motion for Summary Disposition was filed March 13, 2003. **Technically, Plaintiff could have raised the issue in his brief in Opposition to Defendant's Motion for Summary Disposition or at the hearing, but, instead did not raise the issue until his Motion for Reconsideration.**

Justice Patrick M. Meter, the third member on this case's panel, filed his concurrence with parts one and two of the majority's opinion and his dissension from part three. **He would have affirmed this case in its entirety.**

3. **The Appellate Court's decision in the case at bar is clearly erroneous and will cause material injustice.**

Plaintiff filed this lawsuit alleging premises liability. He endured questions regarding the open and obvious doctrine during his deposition. He was confronted with Defendant's case evaluation that utilized the open and obvious doctrine.

Defendant filed a motion for summary disposition relying upon the open and obvious doctrine on December 17, 2002. Plaintiff filed his response to Defendant's motion for summary disposition, together with his brief in opposition, on or about March 19, 2003. Defendant filed a brief in reply on or about March 25, 2003. The motion for summary disposition was heard by Judge O'Brien in the circuit court for the County of Oakland on or about March 26, 2003. Plaintiff did not present the issue regarding statutory duty in his response brief or during oral argument. Judge O'Brien issued an opinion and order

granting Defendant's motion for summary disposition on March 26, 2003. Plaintiff filed a motion for reconsideration and rehearing of opinion and order granting Defendant's motion for summary disposition on or about April 9, 2003.

In Plaintiff's motion for reconsideration, he, **for the first time**, raised the statutory duty imposed by MCL 554.139. He also cited Woodbury v Bruckner, 467 Mich 922 (2002), decided on December 26, 2002. This Woodbury order remanded the case to the Court of Appeals and stated that the open and obvious doctrine cannot be used to avoid a specific statutory duty as cited in Jones v Enertel, Inc., 467 Mich 266 (2002). The Jones case was decided on September 17, 2002 and stood for the proposition that the open and obvious doctrine does not apply to a statutory duty. **Accordingly, both Woodbury, supra, and Jones, supra, were available prior to the date that Plaintiff filed his response to Defendant's motion for summary disposition in the case at bar.** The Michigan Appellate Court also published two cases in 1995 which stood for the proposition that the open and obvious danger does not apply to a statutory duty. Those cases are Walker v Flint, 213 Mich App 18 (1995), decided on August 22, 1995, and Haas v City of Ionia, 214 Mich App 361 (1995), decided on November 21, 1995.

Clearly, the Michigan law and supporting case law were available to Plaintiff prior to the motion for summary disposition. In the instant case, Plaintiff/Appellee should have been on notice of the relevant Michigan case law. Regarding the statutory duty, this Appellate panel admitted on page four of their opinion "Plaintiff did not specifically raise this claim until his motion for reconsideration." This Appellate panel stated in footnote 3 on page 6 of its opinion:

> Typically, it is not an abuse of discretion for the trial court to deny a motion for reconsideration where a legal theory or facts could have been argued before entry of the trial court's original order. See Charbeneau v Wayne Co. Gen. Hosp., 158 Mich App 730, 733; 405 NW2d 151 (1987). But we note that in light of the fact that trial court did not base its denial on the fact that plaintiff did not specifically make the claim prior to the trial court's original order and the recentness of the case law supporting defendant's claim; an abuse of discretion exists. The case supporting plaintiff's position was decided December 26, 2002. Plaintiff's complaint was filed April 1, 2002 and brief in opposition to defendant's motion for summary disposition was filed March 13, 2003. **Technically, plaintiff could have raised the issue in his brief in opposition to defendants' motion for summary disposition or at the hearing, but, instead, did not raise the issue until his motion for reconsideration.** (Emphasis added.)

Judge Meter concurred in Parts I and II of the majority opinion but dissented from Part III. He would affirm the case in its entirety. Judge Meter, regarding the statutory duty, stated,

> Plaintiff is not entitled to reversal with respect to this issue. Indeed, he failed to preserve the issue concerning MCL 554.139 because he did not mention the statute, with its corresponding inapplicability of the open and obvious defense, during the summary disposition proceedings, despite the fact that the Woodbury decision was released before plaintiff filed his brief in response to defendants' motion for summary disposition. ... He raised the issue only in a motion for rehearing and reconsideration. As noted in MCR 2.119(F)(3), to be entitled to relief with respect to a motion for rehearing or reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different position of the motion must result from correction of the error." Here, no palpable error occurred, because plaintiff *did not even allege* a violation of MCL 554.139 until he filed his motion for rehearing and reconsideration. ... Appellate relief is unwarranted.[2]

Very importantly, Defendant is in complete agreement with the contents of footnote 1 in

Judge Meter's dissent. Footnote 1 of Judge Meter's dissent on page 2 states, "While the trial court mentioned alternative grounds for its ruling denying the motion for rehearing and reconsideration, I note that this court does not reverse when the trial court reaches the correct result for the wrong reasons. See Ford Motor Credit Co. v Detroit, 254 Mich App 626, 633-634; 658 NW2d 180 (2003)."

As pointed out by Judge Meter, the majority's opinion is clearly erroneous and has caused material injustice. Defendant has been forced to file a motion for reconsideration to the Appellate Court, which was denied, and has now been forced to apply for leave to appeal to the Supreme Court of Michigan. If the majority opinion is allowed to stand this particular Defendant will have been deprived justice.

4. The Michigan courts, practitioners, and litigants need the guidance of a recent Supreme Court opinion.

It is paramount that the Michigan Supreme Court take this case and clarify this issue for the Michigan courts, the Michigan practitioners, and individual litigants. The majority of the Appellate panel in the case at bar seems to need guidance considering the disparity between the opinions in the case at bar and the Hernandez, supra, case. This majority blatantly failed to follow the stare decisis of the Michigan Appellate Court cases and the Michigan Supreme Court case, Brookdale, supra. The Brookdale case was decided in 1955. It would be extremely beneficial for the Michigan court system if the Michigan Supreme Court would eliminate any doubt that it is not palpable error for a trial court to deny a motion for reconsideration when a plaintiff brings an issue, for the first time, during the motion for reconsideration, when the issue was readily available prior to the order granting a motion for summary disposition.

VI. CONCLUSION

With a flick of the pen, the opinion of the majority of the Court of Appeals panel eviscerates the clear precedential case law that stands for the proposition that a trial court does not abuse its discretion in denying a motion for reconsideration resting on a legal theory and facts which could have pled or argued prior to the trial court's original order. No longer is a plaintiff bound by the Michigan Supreme Court rule involving compulsory joinder. No longer can a defendant rest assured that by the time he has filed his motion for summary disposition he has efficiently and completely conducted discovery. No longer can litigants and practitioners rely upon the stare decisis in the State of Michigan that a plaintiff waives any legal theory or facts that could have been pled or presented prior to a court's original order - for all a plaintiff is required to do to avoid having their complaint dismissed is to file a motion for reconsideration with a new theory of law or facts and effectively get "another bite at the apple."

The Court of Appeals' decision involves legal principles of major significance to the state's jurisprudence. In almost any civil action, a plaintiff has the availability to file a motion for reconsideration. This decision will add to the courts' dockets by preventing defendants from achieving finality with a motion for summary disposition or potentially a directed verdict or a jury verdict.

This Appellate decision flies in the face of years of Michigan jurisprudence. Not only has this panel contradicted published Appellate case law and Supreme Court case law, the majority decided completely contrary to a decision they made in an unpublished case less than two months prior to this decision.

This Defendant has been subjected to material injustice and a lack of due process

as this Court's decision is clearly erroneous. The majority of this Appellate panel has abused its discretion by opining that Plaintiff properly pled a statutory duty and that Plaintiff be excused from due diligence in his legal research. It is obvious that Plaintiff did not realize that he may have had a statutory duty claim, or else he would have made mention of same in his complaint, in his response brief, or at oral argument at Defendant's motion for summary disposition. This application cites the applicable case law and dates that clearly indicate that Plaintiff should have been on notice that Defendant may have owed Plaintiff a statutory duty. Justice Meter got it right. Justice Meter's dissent hits every point and is accurate. Justice Meter would have affirmed the trial court in its entirety.

The Supreme Court needs to address this issue and provide the lower court's practitioners and litigants with guidance. Michigan jurisprudence would benefit from a recent opinion fully explaining that a plaintiff effectively waives any legal issues or arguments that were available, but not pled or argued prior to the trial court's original order.

VII. RELIEF REQUESTED

For the reasons set forth in this Application for Leave to Appeal, the Defendant/Appellant, BRANDON'S LANDING BOAT BAR, respectfully requests this Honorable Court for entry of an order granting leave to appeal in this matter and thereinafter, reverse the decision of the Court of Appeals and reinstate the order of the trial court granting summary disposition in this matter.

Respectfully submitted:

By: 

Richard F. Carron (P52854)
Attorney for Defendant/Appellant
28819 Franklin Road, Suite 100
Southfield, MI 48034
(248) 204-4649

Date: November 30, 2004